

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1900.

No. 1011.

32

BRAINARD H. WARNER AND LOUIS D. WINE,
APPELLANTS,

vs.

LILY ALYS GODFREY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 26, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1900.

No. 1011.

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In the Court of Appeals of the District of Columbia.

BRAINARD H. WARNER ET AL., Appellants, }
vs. } No. 1011.
LILY ALYS GODFREY.

a Supreme Court of the District of Columbia.

LILY ALYS GODFREY }
vs. } No. 17631. In Equity.
BRAINARD H. WARNER ET AL.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Filed Mar. 1, 1900. J. R. Young, Clerk.

UNITED STATES OF AMERICA, ss :

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting :

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Lily Alys Godfrey, complainant, and Stephen A. Dutton, Cora M. Dutton, his wife; Frederick M. Czaki, Mary Alice Godfrey, Louis Wine Richardson, Brainard H. Warner, and Louis D. Wine, defendants, equity, No. 17631, wherein the decree of the said supreme court, entered in said cause on the 24th day of January, A. D. 1899, is in the following words, viz:

"This cause coming on to be heard upon the pleadings and evidence and having been argued by the counsel for the parties respectively and submitted to the court at the December, 1898, term thereof, and having been duly considered, it is thereupon by the court this 24th day of January, A. D. 1899, adjudged, ordered, and decreed that as against the defendants Louis W. Richardson, Brainard H. Warner, and Louis D. Wine the bill and amended bills of the complainant be, and the same hereby are, dismissed with costs, and that the said defendants do recover their said costs against the complainant and against the American Surety Company of New York, her surety in the undertaking for costs filed herein on the 16th day of

July, 1897, pursuant to the terms of said undertaking, and that said defendants have execution therefor as at law.

A. B. HAGNER,
Asso. Justice."

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears ;

2 And whereas in the present term of January, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and was argued by counsel :

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed ; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court with directions to vacate the said decree and take such further proceedings in accordance with the opinion of this court as may be expedient and proper, the costs of this appeal to be divided equally between the parties.

And that the said complainant, Lily Alys Godfrey, recover against the said defendants seven hundred and thirty-nine dollars and ninety cents for one-half of the costs herein expended and have execution therefor.

February 8, 1900.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 1st day of March, in the year of our Lord one thousand nine hundred.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Complainant.

| | |
|--------------------------------------|----------|
| $\frac{1}{2}$, clerk..... | \$70.65 |
| $\frac{1}{2}$, printing record..... | 669.25 |
| | <hr/> |
| | \$739.90 |

[Endorsed:] 17631. Eq. Court of Appeals of the District of Columbia, No. 892, January term, 1900. Lily Alys Godfrey, appellant, *vs.* Stephen A. Dutton *et al.* Mandate remanding for further proceedings. Filed Mar. 1, 1900.

3

Amendment to Bill.

Filed Mar. 27, 1900.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

| | |
|---------------------------------------|----------------------|
| LILY ALYS GODFREY, Complainant, | } Equity. No. 17631. |
| vs. | |
| STEPHEN A. DUTTON ET AL., Defendants. | |

To the supreme court of the District of Columbia, holding a special term in equity:

Now comes the complainant and, by leave of the court first had and obtained, amends her bill of complaint in this cause in manner following—that is to say, by inserting after the 9th paragraph of said bill of complaint as amended and filed July 17, 1897, the following:

Complainant further shows that at the time of the said purchase by the said Warner & Wine they were, as members of said firm of B. H. Warner & Co., agents for the said Dutton to find a purchaser for said premises; that as such agents they were without legal right to become purchasers without the knowledge and assent of their employer; and complainant is advised and believes, and so believing charges, that the said Warner and Wine, for the said firm of B. H. Warner & Co., did not inform the said Dutton that they, the said Warner and Wine, were the parties in real interest as purchasers, but concealed such fact and held out the said Louis Wine Richardson as a person to whom they had, as agents for said Dutton, made sale of said premises. Wherefore complainant charges

4 that such purchase by the said Warner and Wine was fraudulent at law and voidable at the election of said Dutton or of this complainant, for whom said Dutton held title under a constructive trust, by reason of his deceits and frauds aforesaid.

And complainant also amends her said amended and supplemental bill by inserting after the statement in paragraph twelve thereof, that she had made demand upon the defendant Richardson for a reconveyance to her of her said property, but that he refuses so to reconvey, the following.

This complainant here tenders herself ready and willing to pay to the said defendants or any of them, upon a reconveyance to her of said premises, such sum, if any, as the court may find to have been paid by them or any of them on account of said property and which should in equity and good conscience be repaid them by her.

BIRNEY & WOODWARD,
Solicitors for Complainant.

(Endorsed:) Leave is hereby granted complainant to file this amendment to the bill. Job Barnard, justice. March 27, 1900.

5 *Answer of Brainard H. Warner and Louis D. Wine to the
Amendment to Bill.*

Filed Mar. 27, 1900.

In the Supreme Court of the District of Columbia.

| | | |
|-------------------------|---|--------------------|
| LILY ALYS GODFREY | } | Equity. No. 17631. |
| vs. | | |
| STEPHEN A DUTTON ET AL. | | |

Answer of Brainard H. Warner and Louis D. Wine to bill as amended March 27th, 1900.

The defendants Brainard H. Warner and Louis D. Wine for answer to the amendment to the bill of complaint in the above-entitled cause this day filed, answering, say :

1. They deny that the firm of B. H. Warner & Co. were agents for the defendant Stephen A. Dutton to find a purchaser for the real estate in controversy, as alleged by said amendment, or that the said firm or any of its members ever were the agents of the said Stephen A. Dutton for any purpose whatsoever. It is true that in Exhibit L. W. R. No. 1, filed as an exhibit to the answer of the defendant Louis W. Richardson to the original bill in this cause, "B. H. Warner & Co." are mentioned as agents of unnamed parties of the first part, but they aver that this circumstance grew out of the fact that a printed form of memorandum of sale belonging to the said firm, in which their names were printed as agents of the vendor, was used in the transaction, the same being the said Exhibit L. W. R. No. 1, and by a purely clerical omission the name of the said firm was not struck out and that of Mrs. Ellen S. Mussey, who was the only agent of the said Stephen A. Dutton in the matter, inserted instead. So far from being the agents of Stephen A. Dutton, neither of these defendants nor any member of the firm of B. H. Warner & Co. was aware at the time the said memorandum of sale was prepared who was the owner of the property described in it, agency for which owner is now sought to be charged upon them, and the name of the vendor was accordingly left blank in the said memorandum for that reason. Both the said Ellen S. Mussey, who was the agent of the said Stephen A. Dutton, and the said Stephen A. Dutton himself well knew throughout the entire transaction that the firm of B. H. Warner & Co. represented the purchaser of the said property, and in no way represented or claimed to represent the said Stephen A. Dutton.

Further answering the said bill as now sought to be amended, these defendants show to the court that in the beginning of this controversy they offered to restore to the complainant the property in dispute upon terms of being reimbursed simply the moneys they had actually expended in its purchase, which proposition was refused by the complainant, who insisted upon attempting to regain

the property without reimbursing these defendants, either wholly or in part for their said outlay, by seeking to establish against them express and flagrant frauds and perjury, through testimony which the courts have found to be wilfully and consciously false, and in her efforts so to do has subjected these defendants to great expense in defending themselves against the said charges, namely, to costs exceeding the sum of six thousand dollars ; and, as these defendants are advised and believe, and therefore aver, the amendment this day filed by her is an incompetent and inequitable departure from the case

as heretofore presented and insisted upon by her and one proceeding under different legal premises from those relied upon
7 in and by her original, amended, and supplemental bills, making an entirely different, new, and independent case, and calling for a defense different from that required under her said original and amended supplemental bills ; and they are further advised and believe, and therefore aver, that it is contrary to equity and good conscience that, after having refused to accept the offer of these defendants to reconvey the property upon being reimbursed their expenditures, and after having subjected them to the great expense and burden of defending themselves against the said charges so wrongfully brought against them, now to amend her bill by demanding reconveyance of the property upon terms merely of paying to them such sums as have been paid by them on account of the property.

These defendants have received notice from the solicitors of the complainant of an application to the court to permit the filing of her said amendment of this date and to follow the same immediately by a decree requiring these defendants to convey the said property to her upon payment to them " of such sums of money as they have actually paid to Stephen A Dutton at the time of the conveyance of said property by said Dutton to the said Louis Wine Richardson and such other sums as they may since then have paid in the discharge of taxes and incumbrances resting upon such property, less, however, such sums as they, or any of them, may have received as rents and profits of the property since their possession began," without affording these defendants the opportunity to take any testimony to disprove the allegation of said amendment that the firm of B. H. Warner & Co. were agents for Stephen A. Dutton. These defendants,

on the contrary, are advised and believe, and therefore aver,
8 that they are entitled to answer the said allegation now for the first time brought forward against them, and to take testimony in their defense in that regard, and they submit to the court that they are entitled so to do.

BRAINARD H. WARNER.
LOUIS D. WINE.

W. F. MATTINGLY,
J. J. DARLINGTON, *Solicitors.*

DISTRICT OF COLUMBIA, ss.:

We, Brainard H. Warner and Louis D. Wine, on oath say that we have read the foregoing answer by us subscribed and know the contents thereof; that the matters therein set forth as of our own personal knowledge are true, and that the matters and things therein alleged upon information and belief we believe to be true.

BRAINARD H. WARNER,
LOUIS D. WINE.

Subscribed and sworn to before me this 27th day of March, A. D. 1900.

HENRY J. GROSS,
Notary Public.

[SEAL.]

9

Decree and Reference to Auditor.

Filed Mar. 27, 1900.

In the Supreme Court of the District of Columbia.

LILY ALYS GODFREY, Plaintiff,

vs.

STEPHEN A. DUTTON ET AL., Defendants.

} Equity. No. 17631.

Upon consideration of the mandate and opinion of the Court of Appeals in this cause, it is this 27th day of March, 1900, ordered, adjudged, and decreed that the decree heretofore entered by this court dismissing the bill of complaint in this cause be, and the same is hereby, vacated and set aside, and that the complainant have execution against the defendants Brainard H. Warner and Louis D. Wine for seven hundred and thirty-nine dollars and ninety cents, the amount adjudged to her by said Court of Appeals for costs in said court.

It is further ordered that the complainant have leave to amend her amended and supplemental bill herein in the manner indicated in the said opinion of the Court of Appeals, which being now done, and the answer of the defendants Warner and Wine thereto having been filed, and it appearing to the court from the opinion of the Court of Appeals that the complainant is entitled to have said lots 1, 2, 3, and 66, in square No. 134, conveyed to her upon the payment by her to the defendants Warner and Wine the money actually paid by them to the defendant Stephen A. Dutton and all other sums that have been paid by them in the discharge of taxes and incumbrances, less such sums as they may have received or ought in the exercise of due diligence to have received as rents and profits of the property since their possession began, it is this 27th day of March, A. D. 1900, ordered that this cause be, and the same hereby is, referred to the auditor of the court, upon the proofs already in the cause and such further proofs as may be offered, to ascertain and report to the court the amount to be paid by the plaintiff to the defendants Warner and Wine to entitle her to a conveyance of said parcels of land to her.

JOB BARNARD, *Justice.*

Report of Auditor.

Filed May 5, 1900.

In the Supreme Court of the District of Columbia.

| | | |
|--------------------------|---|------------------------------|
| LILY ALYS GODFREY | } | No. 17631, Equity Docket 41. |
| vs. | | |
| STEPHEN A. DUTTON ET AL. | | |

This cause is referred to the auditor to ascertain and report the amount to be paid by the plaintiff to the defendants Warner and Wine to entitle her to a conveyance to her of lots 1, 2, 3, and 66, in square 134. After due notice I proceeded under this order of reference, counsel for the plaintiff and defendants being present.

In the schedule herewith I have stated an account of the money actually paid by the said defendants to the said Stephen A. Dutton as purchase-money. In the account presented by the said
11 defendants this item is stated as \$7,186.33.

It appears, however, that \$500.00 of this sum was taken by the said defendants as commissions, and is therefore excluded from this statement. I have then stated the amount of taxes, interest upon the trust indebtedness, and payment for water rent and repairs. From the aggregate of these several sums I have deducted the rents collected by the said defendants from September 30th, 1896, to March 31st, 1900, inclusive, the result showing the amount to be paid by the plaintiff to the said defendants.

The claim for disbursements presented by the said defendants includes a number of payments to solicitors and counsel and for costs of the said defendants. In behalf of the plaintiff objection is made to these items, and, construing the order of reference as limiting the allowance in this account to the payment of purchase-money and the sums paid in the discharge of taxes and encumbrances, I have excluded other disbursements from the annexed statement of account.

JAS. G. PAYNE, *Auditor.*

Auditor's fee, \$15.00.

12 Account showing the amount to be paid by the plaintiff to the defendants Brainard H. Warner and Louis D. Wine to entitle her to a conveyance of the said lots one, two, three, and sixty-six, in square one hundred and thirty-four.

| | |
|---|----------|
| Amount paid as purchase-money, not including \$500.00 | |
| taken as commissions..... | 6,586.33 |
| Taxes paid by said defendants..... | 1,056.26 |
| Interest paid by them— | |
| On indebtedness of 3,500.00..... | 735.00 |
| “ “ “ 4,000.00..... | 960.00 |
| “ “ “ 10,000.00..... | 2,100.00 |
| | <hr/> |
| | 3,795.00 |

| | |
|---|-----------|
| Paid water rents..... | 16.47 |
| “ for repairs..... | 91.70 |
| | <hr/> |
| | 11,545.76 |
| Less rents collected from September 30, 1896, to March 31, 1900, inclusive, per statement filed.... | 1,090.48 |
| | <hr/> |
| Amount to be paid as above..... | 10,455.28 |

JAS. G. PAYNE, Auditor.

13

GODFREY
vs.
DUTTON ET AL. }

Account of B. H. Warner and L. D. Wine.

April 17, 1900.

Receipts.

| | | | | | | |
|-----------|-------------------------------|--|--|--|--|---------|
| 1896. | | | | | | |
| Sept. 30. | From rent 1801 “ Q ” N. W.... | | | | | \$25.36 |
| Nov. 2. | “ “ “ “ | | | | | 25.36 |
| Nov. 27. | “ “ “ “ | | | | | 25.36 |
| 1897. | | | | | | |
| Jan. 2. | “ “ “ “ | | | | | 25.36 |
| Feb’y 1. | “ “ “ “ | | | | | 25.36 |
| Mar. 3. | “ “ “ “ | | | | | 25.36 |
| Apr. 1. | “ “ “ “ | | | | | 25.36 |
| May 1. | “ “ “ “ | | | | | 25.36 |
| June 2. | “ “ “ “ | | | | | 25.36 |
| July 1. | “ “ “ “ | | | | | 25.36 |
| Aug. 3. | “ “ “ “ | | | | | 25.36 |
| “ 31. | “ “ “ “ | | | | | 25.36 |
| Sept. 30. | “ “ “ “ | | | | | 25.36 |
| Oct. 30. | “ “ “ “ | | | | | 25.36 |
| Nov. 17. | “ “ “ “ | | | | | 25.36 |
| 1898. | | | | | | |
| Jan. 3. | “ “ “ “ | | | | | 25.36 |
| “ 31. | “ “ “ “ | | | | | 25.36 |
| Feb’y 28. | “ “ “ “ | | | | | 25.36 |
| April 1. | “ “ “ “ | | | | | 25.36 |
| “ 30. | “ “ “ “ | | | | | 25.36 |
| June 1. | “ “ “ “ | | | | | 25.36 |
| “ 30. | “ “ “ “ | | | | | 25.36 |
| Aug. 2. | “ “ “ “ | | | | | 25.36 |
| “ 31. | “ “ “ “ | | | | | 25.36 |
| Sept. 30. | “ “ “ “ | | | | | 25.36 |
| Oct. 31. | “ “ “ “ | | | | | 25.36 |
| Nov. 30. | “ “ “ “ | | | | | 25.36 |

| | | | | | |
|-------------|-----|---|---|---|------------|
| 1899. | | | | | |
| Jan. | 3. | " | " | " | 25.36 |
| " | 31. | " | " | " | 25.36 |
| Feb'y | 28. | " | " | " | 25.36 |
| April | 1. | " | " | " | 25.36 |
| May | 1. | " | " | " | 25.36 |
| June | 1. | " | " | " | 25.36 |
| " | 26. | " | " | " | 25.36 |
| July | 1. | " | " | " | 25.36 |
| Aug. | 31. | " | " | " | 25.36 |
| Sep. | 30. | " | " | " | 25.36 |
| Oct. | 31. | " | " | " | 25.36 |
| Nov. | 29. | " | " | " | 25.36 |
| 1900. | | | | | |
| Jan. | 2. | " | " | " | 25.36 |
| " | 31. | " | " | " | 25.36 |
| Feb. | 28. | " | " | " | 25.36 |
| Mar. | 31. | " | " | " | 25.36 |
| Total | | | | | \$1,090.48 |

14

Disbursements.

| | | | | | |
|-------|-----|--|--|--|------------|
| 1896. | | | | | |
| Apr. | 15. | Am't paid Col. Title Co. set. lots... | | | \$7,086.33 |
| May | 21. | " " taxes | | | 128.56 |
| June | 26. | " " interest on \$3,500 encumbrance ... | | | 105 |
| Sep. | 19. | " " " " 4,000 " | | | 120 |
| Oct. | 1. | " " water rent..... | | | 3.72 |
| " | " | " " repairing locks, etc..... | | | 3 |
| " | " | " " " range | | | 8.50 |
| Nov. | 3. | " " glazing | | | 3.20 |
| 1897. | | | | | |
| Jan. | 2. | " " latrobe..... | | | 16 |
| " | 25. | " " interest on \$3,500 encumbrance ... | | | 105 |
| Feb. | 1. | " " " " 4,000 " | | | 120 |
| " | 12. | " " " " 10,000 " | | | 300 |
| Mar. | 13. | " " rep'g range, etc..... | | | 14 |
| June | 22. | " " interest on \$3,500 encumbrance ... | | | 105 |
| July | 22. | " " " " 10,000 " | | | 300 |
| " | 27. | " " " " 4,000 " | | | 120 |
| Aug. | 5. | " " water rent..... | | | 4.25 |
| Nov. | 24. | " " taxes, 1st half, '98 | | | 122.70 |
| Dec. | 1. | " " interest on \$10,000 encumbrance .. | | | 300 |
| " | 13. | " " " " 3,500 " | | | 105 |
| 1898. | | | | | |
| Feb. | 1. | " " " " 4,000 " | | | 120 |
| May | 3. | " " taxes, 1897, 1898, $\frac{1}{2}$, special ... | | | 446.68 |
| June | 4. | " " interest on \$10,000 encumbrance .. | | | 300 |
| " | 7. | " " Mattingly (retaining fee) | | | 100 |
| " | 17. | " " interest on \$3,500 encumbrance... | | | 105 |
| Aug. | 1. | " " " " 4,000 " | | | 120 |

| | | | | | |
|-------------|-----|---|---|------------------------------------|-------------|
| " | 20. | " | " | water rent..... | 4.25 |
| Oct. | 1. | " | " | witness fee (Vaughan) | 1.25 |
| " | 12. | " | " | McLaughlin, att'y, Boston..... | 74.60 |
| Nov. | 18. | " | " | J. E. Potbury (att'y)..... | 117 |
| " | 29. | " | " | taxes, 1st half, '99..... | 122.70 |
| " | 30. | " | " | repairing porch, latrobe, etc..... | 22.50 |
| Dec. | 13. | " | " | interest on \$10,000 encumbrance.. | 300 |
| 1899. | | | | | |
| Jan. | 4. | " | " | paid Carusi ac. fee | 500 |
| " | 28. | " | " | interest on \$10,000 encumbrance.. | 300 |
| Feb. | 1. | " | " | Carusi (set. fee)..... | 1,000 |
| " | " | " | " | interest on \$4,000 encumbrance... | 120 |
| Mar. | —. | " | " | counsel fees, Mr. Mattingly..... | 1,500 |
| " | " | " | " | " " " Darlington ... | 2,000 |
| Apr. | 7. | " | " | repairing fence | 2.50 |
| June | 2. | " | " | taxes, 2nd half, '99.... | 122.70 |
| " | 6. | " | " | interest on \$10,000 encumbrance.. | 300 |
| " | 14. | " | " | " " 3,500 " .. | 105 |
| Aug. | 9. | " | " | " " 4,000 " .. | 120 |
| " | 10. | " | " | water rent | 4.25 |
| Nov. | 14. | " | " | taxes, 1st half, 1900 ... | 112.92 |
| Dec. | 15. | " | " | latrobe | 22 |
| " | 21. | " | " | interest on \$3,500 encumbrance .. | 105 |
| 1900. | | | | | |
| Feb. | 1. | " | " | " " 4,000 " .. | 120 |
| Apr. | 10. | " | " | com'n collections ... | 54.52 |
| Total | | | | | \$17,393.13 |

Disbursements in payment of examiner's fees for taking depositions on behalf of defendants, being taxed in the cause as costs, are not included in this statement.

GODFREY }
vs.
DUTTON. }

MONDAY, April 30th, 1900—10.30 p. m.

Hearing pursuant to notice.

Present: Mr. Darlington, for the defendants, and Mr. Birney, for the complainant.

Mr. DARLINGTON: In behalf of the defendants Warner and Wine, I offer a statement containing the receipts from the property payments to Dutton and disbursements on account of the property, also containing the expenses to which they have been subjected on account of this suit, exclusive of the examiner's fee, which is also offered in evidence, amounting to \$1,626.00.

I submit, on behalf of the defendants, that they are entitled to reimbursement, including solicitors' fees and costs, in view of the fact that the record shows that at the beginning of this suit Warner

& Wine offered to convey the property to the plaintiff on being reimbursed their actual disbursements at that time. This is shown by the deposition of E. H. Thomas, and also in connection with the deposition of James E. Fitch. I submit that, this offer being then declined, the defendants should be reimbursed the costs which were incurred from the refusal to accept it.

Counsel for the plaintiff accepts the statement of receipts as shown in the account offered as correct, and of the items claimed as disbursements he objects to the following:

The 500.00 of the 7,086.33 found in the first item, this sum of 500.00 being the amount retained by the defendants Warner & Wine.

Mr. DARLINGTON: That sum went to Warner, Wine & Company.

Mr. BIRNEY: As commissions to the firm of B. H. Warner & Company upon the purchase price of 25,000.00 agreed to be paid Stephen A. Dutton. We also object to the allowance of all amounts claimed to have been paid attorneys for services in this cause and to a witness fee of 1.25 paid one Vaughan, and also to the taxed costs and examiner's fees as shown in the short copy, none of these being chargeable under the decree of the Court of Appeals and the order of the court in special term following the decree of the Court of Appeals.

The case is then submitted to the auditor.

Exceptions of Warner and Wine to Report of Auditor.

Filed May 10, 1900.

In the Supreme Court of the District of Columbia.

| | | |
|--------------------------|---|--------------------|
| LILY ALYS GODFREY | } | Equity. No. 17631. |
| vs. | | |
| STEPHEN A. DUTTON ET AL. | | |

The defendants Brainard H. Warner and Louis D. Wine except to the disallowance in and by the auditor's report, filed herein on the fifth day of May, A. D. 1900, of their costs and expenses as set forth in the account presented by them to him and returned with his said report, aggregating \$5,292.85, and also of the examiner's fees incurred by them in their defense, amounting to \$1,626 additional, on the ground that, as shown by the testimony of E. H.

17 Thomas, Esquire, nowhere refuted, and also in connection with the testimony of James E. Fitch, said defendants, at the beginning of this suit, offered to reconvey the property in controversy to the complainant upon reimbursement of their actual disbursements at that time, and that, the defendants' said costs and expenses having been incurred solely by reason of the complainant's refusal of the said offer and of her effort to regain her property without said reimbursements by the establishment of unfounded charges of fraud and criminality against them, her right to change her position in that regard, if it exists at all at this stage of the case,

is in equity subject to the duty of making good to them the actual costs to which they were subjected by her then refusal of the only relief now claimed.

Said defendants also except to the said report, in that it allows them no interest upon the purchase-money, taxes, interest, and other charges paid by them, set forth in the said report and in the statement accompanying the same, although charging them with the rents and profits of the said property.

W. F. MATTINGLY,
J. J. DARLINGTON,
Sol'rs for Def'ts Warner and Wine.

18

Replication.

Filed May 31, 1900.

In the Supreme Court of the District of Columbia.

LILY ALYS GODFREY
vs.
STEPHEN A. DUTTON ET AL. } 17631.

Now comes the complainant and joins issue with the defendants Brainard H. Warner and Louis D. Wine upon their answer to the complainant's last amendment to her bill of complaint.

BIRNEY & WOODWARD,
Counsel for Complainant.

Order Overruling Exceptions to Auditor's Report and Ratifying Same.

Filed Jun- 13, 1900.

In the Supreme Court of the District of Columbia.

LILY ALYS GODFREY, Complainant, }
vs. } No. 17631. Equity.
STEPHEN A. DUTTON, Defendant. }

This cause coming on for further hearing upon the record and proceedings herein and the exceptions to the auditor's report, and being heard, argued by counsel, submitted to and considered by the court—

19 It is this 13th day of June, 1900, adjudged, ordered, and decreed that the said exceptions be, and they are hereby, overruled, and the said report ratified and confirmed, and that the defendants Brainard H. Warner and Louis D. Wine are hereby decreed to convey unto said complainant, Lily Alys Godfrey, her heirs or assigns, said lots numbered one (1), two (2), three (3), and sixty-six (66), in said square numbered one hundred and thirty-four (134), in the city of Washington, District of Columbia, upon the payment to them by the said complainant of the said sum of \$10,455.28, as reported by the auditor, and such further sums as they may have

paid since the close of the account embraced in said report on account of taxes, encumbrances, and ordinary expenses necessarily incurred in the management of said property in excess of rents received by them therefor, and in default by said complainant in the payment of said sums within ninety days from this date the bill of complaint herein shall stand dismissed, with costs. In the event that such payment is made within said ninety days neither party shall be entitled to judgment for costs herein against the other, but the respective parties shall pay their own costs.

JOB BARNARD, *Justice*.

20

Order for Severance on Appeal.

Filed Jun- 14, 1900.

In the Supreme Court of the District of Columbia.

| | | |
|--------------------------|---|-----------------------|
| LILY A. GODFREY | } | No. 17631. In Equity. |
| vs. | | |
| STEPHEN A. DUTTON ET AL. | | |

The defendants Brainard H. Warner and Louis D. Wine having stated to the court that they desire and intend to appeal from the decree passed herein on the thirteenth day of June, 1900, to the Court of Appeals of the District of Columbia, now, therefore, in order that said defendants may prosecute such appeal, it is this 14th day of June, 1900, on motion of J. J. Darlington and Wm. F. Mattingly, solicitors for said defendants, ordered that the other defendants to this cause, viz., Stephen A. Dutton, Cora M. Dutton, his wife; Frederick M. Czaki, Mary Alice Godfrey, and Louis W. Richardson, be, and they are hereby, notified that unless they signify to the court their intention to join in said appeal on or before the 30th day of June, 1900, and do so join, said defendants, Warner and Wine, be, and they are hereby, permitted to sever in their appeal from said decree and to perfect and prosecute the same.

And it appearing to the court that said defendants hereby notified are all non-residents, it is further ordered that service of this notice be by publishing a copy of this order once in the Washington Law Reporter and five times in the Evening Star newspaper prior to said June 30th.

A. B. HAGNER,
Asso. Justice.

21

Memorandum.

June 28, 1900.—Proof of publication of order for severance filed.

*Acknowledgments of Service of Order of Court in Regard to Severance
on Appeal.*

Filed Jun- 28, 1900.

Blair & Thom, attorneys and counsellors at law, No. 416 Fifth street
N. W., Washington, D. C.

JUNE 26, 1900.

William F. Mattingly, Esq., 435 7th street N. W., city.

DEAR SIR: Your letter of the 21st instant, enclosing copy of notice of publication in equity 17631, was received by me today upon my return to the office after several days' absence. I am not now and have not for several years represented Miss Godfrey in the case mentioned and we have no connection of any kind with any of the parties to the suit. I therefore return your enclosure.

Very truly yours,

CORCORAN THOM.

22

WASHINGTON, D. C., June 27th, 1900.

I acknowledge service of notice of the order of June 14, 1900, in No. 17631, equity, relative to appeal, as per annexed advertisement.

E. H. THOMAS,

Solicitor of Record for Louis W. Richardson.

(The following is a copy of the advertisement referred to in the above letter:)

Filed June 14, 1900. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

| | |
|--------------------------|-------------------------|
| LILY A. GODFREY | } No. 17631. In Equity. |
| vs. | |
| STEPHEN A. DUTTON ET AL. | |

The defendants Brainard H. Warner and Louis D. Wine having stated to the court that they desire and intend to appeal from the decree passed herein on the thirteenth day of June, 1900, to the Court of Appeals of the District of Columbia, now, therefore, in order that said defendants may prosecute such appeal, it is this 14th day of June, 1900, on motion of J. J. Darlington and Wm. F. Mattingly, solicitors for said defendants, ordered that the other defendants to this cause, viz., Stephen A. Dutton, Cora M. Dutton, his wife; Frederick M. Czaki, Mary Alice Godfrey, and Louis W. Richardson, be, and they are hereby, notified that unless they signify to the court their intention to join in said appeal on or before the 30th day of June, 1900, and do so join, that said defendants, Warner and Wine, be, and they are hereby, permitted to sever in their appeal from said decree and to perfect and prosecute the same; and it appearing to

23 the court that said defendants hereby notified are all non-residents, it is further ordered that service of this notice be by publishing a copy of this order once in the Washington Law Reporter and five times in the Evening Star newspaper prior to said June 30.

A. B. HAGNER,
Asso. Justice. [SEAL.]

A true copy.

Test :

J. R. YOUNG, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

je 15-5t

WASHINGTON, D. C., *June 22, 1900.*

I acknowledge service of notice of the order of June 14, 1900, in No. 17631, equity, relative to appeal, as per annexed advertisement.

I do not represent defendants Dutton, although my name appears as such in the record.

JOHN B. LARNER.

To Jno. B. Larner, Esq., sol. of record for Stephen A. & Cora M. Dutton, defendants:

(The advertisement annexed to the above letter is the same as the one annexed to the letter of E. H. Thomas.)

24

Appeal.

Supreme Court, District of Columbia.

| | |
|--------------------------|----------|
| LILY ALYS GODFREY | } 17631. |
| vs. | |
| STEPHEN A. DUTTON ET AL. | |

The defendants Brainard H. Warner and Louis D. Wine hereby appeal from the decree passed herein June 13th, 1900, to the Court of Appeals of the District of Columbia and issue citation.

J. J. DARLINGTON,
WM. F. MATTINGLY,
Sol'rs for said Defendants.

July 3, '00.

Appeal as ordered entered.
1900, 7, 3.

By CL'K.

Memorandum.

July 3, 1900—Appeal bond filed.

25 In the Supreme Court of the District of Columbia.

LILY ALYS GODFREY
 vs.
 STEPHEN A. DUTTON ET AL. } No. 17631. In Equity.

The President of the United States to Lily Alys Godfrey, Greeting :

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 3 day of July, 1900, wherein Brainard H. Warner and Louis D. Wine are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia. Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 3 day of July, in the year of our Lord one thousand nine hundred (1900).

JOHN R. YOUNG, *Clerk*.

Service of the above citation accepted this 2 day of July, 1900.

A. A. BIRNEY,
Attorney for Appellee.

26 *Directions to Clerk for Preparation of Record on Appeal.*

Filed Jul- 3, 1900.

LILY ALYS GODFREY
 vs.
 STEPHEN A. DUTTON ET AL. } # 17631. Eq.

The clerk will please make out the following for transcript of record on appeal:

Amendment to bill, Mar. 27, 1900.

Answer of Warner & Wine thereto, "

Decree.

Report of auditor.

Exceptions thereto.

Confirmation of auditor's report; decree; order severance on appeal.

MEM.—Proof of publication filed June 28, '00.

MEM.—Acknowledgment of service of order of appeal by John B. Larner, solicitor of record for Stephen A. Dutton and wife; Corcoran Thom for Mrs. Godfrey and E. H. Thomas for Louis W. Richardson.

Bond on appeal, &c.

J. J. DARLINGTON,
 W. F. MATTINGLY,
Sol'rs for App'n's.

7, 3, '00.

27 *Stipulation as to Transcript on Second Appeal.*

Filed Jul- 7, 1900.

In the Supreme Court of the District of Columbia.

| | | |
|--------------------------|---|---------------------|
| LILY ALYS GODFREY | } | No. 17631, Eq. Doc. |
| <i>vs.</i> | | |
| STEPHEN A. DUTTON ET AL. | | |

It is hereby stipulated by the parties to the appeal in this cause, taken from the decree of the court passed herein on the 13th day of June, 1900, that said appeal shall be heard upon the printed transcript of the record already on file in the Court of Appeals, subject to its approval, supplemented by the filing and printing of a transcript of the mandate of the Court of Appeals, filed herein on the 1st day of March, A. D. 1900, and of all proceedings in this court subsequent thereto, the said printed and supplemental transcript comprising the complete record of said cause, for all purposes of the appeal from said decree of June 13th, 1900.

A. A. BIRNEY,
Sol'r for Compl't.

J. J. DARLINGTON,
Sol. for Appellants.

28 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, { *ss:*
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 27, inclusive, to be a true and correct transcript of the record, as per directions to clerk herein filed, copy of which is made part hereof, in cause No. 17631, equity, wherein Lily Alys Godfrey is complainant and Brainard H. Warner *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe
Seal Supreme Court my name and affix the seal of said court, at
of the District of the city of Washington, in said District, this
Columbia. 21st day of July, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1011. Brainard H. Warner *et al.*, appellants, *vs.* Lily Alys Godfrey. Court of Appeals, District of Columbia. Filed Jul- 26, 1900. Robert Willett, clerk.

OCT 9 - 1900

Robert W. H. H.

IN THE
Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 1011.

BRAINARD H. WARNER ET AL., APPELLANTS,

vs.

LILY ALYS GODFREY, APPELLEE.

BRIEF FOR APPELLEE.

A. A. BIRNEY,

HENRY F. WOODARD,

Counsel for Appellee.

IN THE
Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 1011.

BRAINARD H. WARNER ET AL., APPELLANTS,

vs.

LILY ALYS GODFREY, APPELLEE.

BRIEF FOR APPELLEE.

Appellants have made no assignment of errors, but their brief suggests that the only question intended to be presented to this court, on this appeal, is whether the court below erred in that part of its decree which required each party to pay his own costs (Rec., p. 13). If any party has the right to complain of this discretionary action of the court, it is the appellee, who has substantially succeeded in her contention that the property in question is hers and is held by the appellants as trustees for her. These costs were paid by appellants in their endeavor to hold the property as their own, and in denial of their trusteeship. They do not, even now, admit their trusteeship, or complainant's right, or submit to convey her the property on any terms. They stand simply as defeated litigants who might well have been taxed with all costs.

Their claim of offer to convey on payment of their disbursements can have no weight in view of their answers in the cause, which nowhere make such offer or suggest a willingness to convey on any terms. Even their last answer, (Rec., pp. 4, 5) to the amendment which expressly

asserts readiness to pay what in good conscience should be paid, does not indicate a willingness to part with title on any terms, and only complains that a supposed informal offer, not found in any pleading, was not accepted.

The testimony to the supposed offer is stated (Rec., p. 11) to be found in the deposition of Mr. Thomas, and in connection with the deposition of Mr. Fitch. Mr. Thomas testified to several conversations with Miss Godfrey's counsel in the spring and summer of 1897, the first being several months after the filing of the answer (Orig. Rec., p. 1154), at a place about which the witness is uncertain, but either at a lunch room or in Judge Wilson's office (Rec., pp. 1151, 1154). Mr. Thomas then stated—

“that I would advise Mr. Warner to take back the money that he had expended in the transaction, *provided the counsel fees for Mr. Warner and Mr. Richardson were paid.*”

At a later interview he told Judge Wilson in presence of Wine—

“that if they would *pay the money that Mr. Wine and Mr. Warner had expended we could settle the suit*, and my recollection is that the matter was left with Mr. Wine to see Mr. Warner about” (Rec., p. 1151).

There is no apparent recession here from the first proposal, for the “money expended” would include counsel fees, and from the fact that Mr. Wine was yet to see Mr. Warner concerning the suggestion, it would appear that Mr. Thomas' remark was far from being a proposition on which appellee's counsel might act. Again, Mr. Thomas says (Rec., p. 1159), that at another interview he advised Mr. Warner to “take his money and have the suit dismissed,” but he fails to indicate that Mr. Warner assented to what was apparently offered by Judge Wilson (Rec., pp. 1151, 1159). At a much later time counsel for Miss Godfrey denied upon the record that “any such proposition was ever

definitely made or communicated to the complainant" (Rec., p. 209).

At the time of that denial counsel for Mr. Warner and Mr. Wine made an oral offer to "make conveyance of the property to the complainant on being reimbursed their actual advances" (Orig. Rec., p. 208). This was as late as February 23, 1898. Even this offer may well be taken to have required payment of counsel fees.

In light of appellants' brief, this court must consider the question of costs as the only error assigned. But appellate courts will not review the discretion exercised in awarding or refusing costs.

Canter *vs.* Insurance Co., 3 Peters, 319.

Johnson *vs.* Dist. of Col., 18 D. C. 220.

II.

The Claim for Interest.

The appellants having acquired title to the property by fraud, as found by this court, have by strenuous litigation kept appellee out of her property for three years, and now claim interest for payments made on account of what they have claimed, and yet claim, was their property. It is submitted that it would not be good morals to give it them, and that there is no sound principle on which they may claim it. Interest is the creature of contract, express or implied, or of positive law. Here there is no contract of either kind, and, of course, no controlling statute. Appellants obtain the principal of their payments only because the court thinks it just it should be paid. To permit a trustee of his own fraud to recover not only his outlays but *profits thereon* in the form of interest is not the discouragement of such trusteeship, that a court of equity will show.

A. A. BIRNEY,

HENRY F. WOODARD,

Counsel for Appellee.